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Why No Rule of Law in Mexico - Explaining the Weaknesses of Mexico's Judicial Branch

Michael C. Taylor

WHY NO RULE OF LAW IN MEXICO? EXPLAINING THE WEAKNESS OF MEXICO'S JUDICIAL BRANCH

MICHAEL C. TAYLOR*

I. INTRODUCTION

The news of lawlessness from Mexico crosses the border quickly. The former President, a national hero while in office, is hidden in exile, acting like a fugitive from justice.[1] Newspaper headlines report that the former President's brother holds over eighty million dollars in Swiss bank accounts under false names.[2] The former President's brother is accused of planning the assassination of the ruling party's number two leader.[3] The assassinated man's brother is arrested in a New York airport with over ten million dollars in cash which he cannot explain.[4] High profile Mexican authorities are shot dead and officials claim suicide.[5] Drug-interdiction officers are murdered in the streets of Mexico City, and guerrillas appear in four southern states of Mexico.[6]

Behind the headlines from Mexico lies a deep problem. It reaches far into the Mexican heart of darkness, further than the sensational stories would suggest; it affects the life of every Mexican citizen, every day. There is no rule of law in Mexico.[7]

These headlines reveal to citizens of the United States how little we know about the Mexican judicial system. Our two countries' fates are connected through an economic treaty,[8] and our people through a common border, yet two juridical

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* Michael C. Taylor researched reforms to the Mexican Constitution as a Fulbright Scholar in Mexico during 1995-96. He is a 1995 graduate of Harvard College and also a graduate of the United World College of the American West in Montezuma, New Mexico. He is presently a management consultant in New York City. He would like to thank the Fulbright Commission and the Institute of International Education, both in New York City and in Mexico City, for making this research possible. His upcoming article *Constitutional Crisis: How Reforms to the Legislature Have Doomed Mexico* will appear in 13 MEXICAN STUDIES/ESTUDIOS MEXICANOS (forthcoming Summer 1997).

1. *See* Tim Golden, *Salinas, at Successor's Request, Leaves for Virtual Exile in U.S.*, N.Y. TIMES, Mar. 13, 1995, at A1, *available in* LEXIS/NEXIS, News Library, NYT File.

2. *See* Julia Preston, *Mexico's Former Chief Expresses 'Amazement' at Brother's Hoard*, N.Y. TIMES, Nov. 27, 1995, at A6, *available in* LEXIS/NEXIS, News Library, NYT File.

3. *See* Sam Dillon, *Zedillo Lectures the Mexicans: Obey the Law*, N.Y. TIMES, Oct. 1, 1996, at A3, *available in* LEXIS/NEXIS, News Library, NYT File.

4. *See* Robert L. Jackson & Juanita Darling, *U.S. Judge Won't Extradite Former Mexico Official*, L.A. TIMES, June 23, 1995, at A1, *available in* WESTLAW, LAT database, 1995 WL 2059057, at *1.

5. *See* Anthony DePalma, *Mexico's Question: Who's in Charge, Anyway?*, N.Y. TIMES, July 2, 1995, at A6, *available in* LEXIS/NEXIS, News Library, NYT File; Tim Golden, *Mexico Judge in Union Case Is Shot Dead*, N.Y. TIMES, June 21, 1995, at A8, *available in* LEXIS/NEXIS, News Library, NYT File.

6. *See* Julia Preston, *Mexico Confronts Rebels with Limited Crackdown*, N.Y. TIMES, Oct. 16, 1996, at A11, *available in* LEXIS/NEXIS, News Library, NYT File.

7. I define "rule of law" as the constructive interaction of institutional and cultural factors characterized by lawfulness on the part of both a nation's government and its citizens. In Mexico, the phrase *estado de derecho* is used to denote the same concept. Mexican President Ernesto Zedillo has made establishing the rule of law a goal of his administration. *See* Dillon, *supra* note 3, at A3. President Zedillo's efforts, however, only highlight Mexico's falling short of the mark. *See id.*

8. *See* North American Free Trade Agreement (NAFTA), Dec. 17, 1992, U.S.-Can.-Mex., 107 Stat. 2057 (effective Jan. 1, 1994).

systems help to keep Mexico and the United States on opposite sides of the world. So little has been written in English about the judicial branch in Mexico that the subject begs for an introduction.[9] My purpose, therefore, is to provide background and to provoke debate.

The most important feature about Mexico's judicial branch[10] is that it is weak in comparison to Mexico's other branches of government.[11] Why is the Mexican judicial branch weak? Some of the causes stem from cultural and structural conditions endemic to Latin America.[12] Others derive from Mexico's peculiar historical development throughout the last two centuries.[13] Another explanation, adopted here, emphasizes the legal and institutional roots of a weak court system.

This Article focuses on the institutional sources of judicial weakness specific to Mexico. Part II introduces the power of the Roman law system as the dominant juridical paradigm adopted by Mexico, provides background on the most

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9. For example, there is only one book written in English on the *amparo* suit (a method of judicial review and a means of challenging the constitution). *See* RICHARD D. BAKER, JUDICIAL REVIEW IN MEXICO: A STUDY OF THE *AMPARO* SUIT (1971). Very few articles in English describe the Mexican system of judicial review and the *amparo* suit. The most complete is Lucio Cabrera & William Cecil Headrick, *Notes on Judicial Review in Mexico and the United States*, 5 INTER-AM. L. REV. 253 (1963). *See also* Carlos del Río Rodríguez, *Judicial Review Seen From a Mexican Perspective*, 20 CAL. W. INT'L L.J. 10 (1989-1990). A few recent articles have reviewed the 1994 judicial reforms. *See* Note, *Liberalismo Contra Democracia: Recent Judicial Reform in Mexico*, 108 HARV. L. REV. 1919 (1995) [hereinafter *Recent Judicial Reform*]; Jorge A. Vargas, *The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1994*, 11 AM. U. J. INT'L L. & POL'Y 295 (1996).

10. The Mexican judicial branch consists of a Supreme Court (*Suprema Corte*), federal circuit courts (*tribunales de circuito*), and local courts, also known as district courts (*tribunales de distrito*). *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [Political Constitution of the United Mexican States] art. 94. *See generally* TOM BARRY, MEXICO: A COUNTRY GUIDE 13 (1992).

Titles of judges fall into three categories according to rank: Supreme Court justices are ministers (*ministros*), circuit court judges are magistrates (*magistrados*), and district court judges are simply judges (*jueces*). *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 94.

Federal circuit courts may be unitary—comprised of one magistrate (*tribunales unitarios de circuito*)—or they may be collegial—comprised of three magistrates (*tribunales colegiales de circuito*). The collegial type of circuit courts, created by a constitutional reform in 1951 specifically to hear *amparo* suits, was based on the United States court system. *See* Héctor Fix-Zamudio, *La Suprema Corte de Justicia y el Juicio de Amparo*, *in* LA SUPREMA CORTE DE JUSTICIA Y EL PENSAMIENTO JURIDICO [The Supreme Court of Justice and Juridical Thought] 162-64 (Poder Judicial de la Federación ed., 1985). For a discussion of *amparo* suits, see *infra* Part II.C.

The executive branch also oversees a number of court systems which are not directly subordinate to the Supreme Court. These courts have specialized jurisdictions, regulated by particular legislative codes. *See* CENTRO DE INVESTIGACIÓN PARA EL DESARROLLO, A.C., REFORMA DEL SISTEMA POLITICO MEXICANO: ALTERNATIVAS PARA EL FUTURO [Mexican Political System Reforms: Alternatives for the Future] 170 (1990) [hereinafter REFORMA DEL SISTEMA]; *see also* ELISUR ARTEAGA NAVA, DERECHO CONSTITUCIONAL: INSTITUCIONES FEDERALES, ESTATALES Y MUNICIPALES [Constitutional Law: Federal, State and Municipal Institutions] 493-94 (1994).

11. *See* ARTEAGA NAVA, *supra* note 10, at 494-96; *see also* REFORMA DEL SISTEMA, *supra* note 10, at 158.

12. *See* Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1, 23-32 (1987).

13. For a historical review of Mexico's judicial branch, see Fix-Zamudio, *supra* note 10; *see also* Lucio Cabrera, *La Revolución de 1910 y el Poder Judicial Federal*, *in* LA SUPREMA CORTE DE JUSTICIA Y EL PENSAMIENTO JURIDICO 181 (Poder Judicial de la Federación ed., 1985); REFORMA DEL SISTEMA, *supra* note 10, at 166-71.

important constitutional reforms to the judicial branch, and describes the *amparo* suit. Part III focuses on the Mexican judicial branch's weaknesses and limitations and provides an analysis of recent constitutional reforms to the judiciary. Part IV provides final thoughts on the structure of the Mexican judicial system. The purpose throughout is to show how contemporary Mexico's courts are weak and ineffective by institutional design. While I offer no solutions, I believe it is important to take the first step and diagnose the cause.

II. BACKGROUND

A. *Mexico and the Roman Law Tradition*

Mexico inherited Spain's Roman law tradition when it gained independence from Spain between 1810 and 1821.[14] The Roman law tradition, which evolved into what most Western European countries now call the civil law,[15] embodies a set of characteristics and legal values distinct from the common law tradition of most English-speaking countries.[16]

Perhaps the foremost value in Roman law is *certainty*.[17] To ensure certainty, legislators in Roman law countries attempt to set out complete written legal codes.[18] Where a law is imprecise or fails to address an issue, the legislature is the body which completes the code.[19] The theoretical advantage of codification is that both citizens and the government know what the law is before a legal conflict arises.[20] Unlike the United States Constitution, Mexico's Magna Carta is meant to be an exhaustively complete code of rules, procedures, rights, and duties for Mexico's rulers and ruled.[21] If a right is not specifically listed in Mexico's Constitution, for example, then that right does not exist. Rules may not be implied, but rather must be expressly spelled out.[22]

The need for certainty means that legislation, rather than judicial interpretation, is the basis for legal reforms.[23] Certainty demands that lawmaking not be left to the potentially ambiguous outcome of a judicial decision. Due to the need for

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14. *See generally* Fix-Zamudio, *supra* note 10, at 118-20 (addressing the Mexican legal development between 1810-1824).

15. The "civil law system," as it is known by common law countries, is referred to as the "Roman law system" in civil law countries. *See* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 7 (2d ed. 1985).

16. *See id.* at 1-5.

17. *See id.* at 48-49.

18. *See id.* at 29, 48.

19. *See id.* at 29, 39. In Mexico, however, the executive exerts pressure over a weak legislature to rewrite the code.

20. *See id.* at 28.

21. This statement may be deduced from the Roman law tradition's emphasis on complete codification, and by the great number of reforms to Mexico's Constitution. *See id.* at 26; SERGIO ELÍAS GUTIÉRREZ S. & ROBERTO RIVES S., LA CONSTITUCION MEXICANA AL FINAL DEL SIGLO XX [The Mexican Constitution at the End of the Twentieth Century] 155 (1995). The quantity of reforms suggests an attempt at "perfection" of the law.

22. *See* MERRYMAN, *supra* note 15, at 28-29.

23. *See id.*

certainty in the Roman law tradition, the Mexican legislature is constantly in the process of rewriting its Constitution of 1917.[24]

The need for certainty also has implications for constitutional interpretation. Because judicial interpretation brings with it the taint of uncertainty, legal interpretation is not performed by judges, but rather by academic specialists.[25] This tradition dates back to the sixth-century Roman codes of Emperor Justinian, when interpretation of the law fell on the shoulders of intellectuals, academics, and professors, but never into the hands of the public servants charged with applying the law.[26] Due to their interpretive role in the Roman law tradition, scholars have had a comparatively greater influence on the law than that afforded to their counterparts in common law countries.[27] The corollary to this is that judges in the Roman law tradition are not given the same power as their counterparts in the common law tradition, where judges are expected to apply, interpret, and, in many cases, effectively create law.

The influence of the Roman law system on the Mexican judicial branch becomes clearer in light of both the great number of constitutional reforms to the Mexican judicial branch and Mexico's method of judicial review. An introduction to these two topics forms the remainder of this background section.

B. Historical Patterns of Constitutional Reforms to the Judiciary

We can learn much about the origins of Mexico's judicial weakness through a historical review of reforms to Mexico's Constitution of 1917. Four discouraging patterns emerge from Mexico's constitutional reforms. From 1917 to the present, reforms show: (1) an attempt to undercut judicial prestige; (2) an effort to curtail the autonomy of the Supreme Court; (3) an adherence to overly rigid theories of law; and (4) a mistrust of the judiciary.[28] It should be acknowledged that these last two patterns, theoretical rigidity and mistrust of courts, are not exclusive to the Mexican political system, but have roots in the Roman law tradition.[29] Roman law traditionally places a heavy emphasis on theories of law, as scholars instead of judges interpret controversial issues.[30]

The historical review below includes only a fraction of all the constitutional changes made to the judicial branch. It focuses on reforms related to the structure

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24. *See* GUTIÉRREZ & RIVES, *supra* note 21, at 155 (counting 344 reforms to the Constitution since 1917). Since 1995, the legislature has passed 18 more reforms to the Constitution, bringing the running total to 362. *See* Miguel Angel Juárez & Daniel Moreno, *Logra el acuerdo un 'pase' histórico*, REFORMA, Aug. 1, 1996, at 1A.

25. *See* MERRYMAN, *supra* note 15, at 56-60.

26. *See id.* at 57-58 (citing Byzantine Emperor Justinian I's CORPUS JURIS CIVILIS (533 a.d.)).

27. *See id.* at 56-60.

28. This is partly from a lack of respect for the judiciary and partly from a need to control the courts as a competing branch of government. The executive traditionally has held a tight rein on the judiciary. "The Spanish judges would impart justice in the name of the king; the Mexicans, although formally doing it in the name of the Mexican Republic, really do it in the spirit of justice [as defined by] the President." ARTEAGA NAVA, *supra* note 10, at 462 (translation by Michael C. Taylor).

29. *See* MERRYMAN, *supra* note 15, at 62-64 (discussing the potential for theoretical rigidity of thought), 15-16, 28-29 (discussing mistrust of the judiciary); *see also* REFORMA DEL SISTEMA, *supra* note 10, at 164.

30. *See* MERRYMAN, *supra* note 15, at 59-60.

of the Supreme Court: terms of office, the process for naming ministers, the number of ministers, and the number of *Salas* (Chambers) in the Supreme Court.[31]

1. 1917

The 1917 Constitutional Congress decided that the Mexican Supreme Court should always act as a unified decision-making body.[32] This mandated unity was a change from the nineteenth-century Supreme Court, which was divided into three specialized *Salas*, each empowered to hear cases within a different field of law.[33] The constitutionalists' rationale for transforming the Supreme Court was that the Supreme Court's deliberations should include the opinions of all Supreme Court members and that dividing the Supreme Court into *Salas* threatened the unity and power of the judicial branch.[34]

To further its mandate of judicial unity, the Constitutional Congress created a Supreme Court of eleven ministers.[35] Eleven, the constitutionalists argued, represented a reasonable size for the Supreme Court to act as a collegial body in making unified decisions.[36]

The constitutionalists also deliberated about how to make the Supreme Court autonomous from the executive, under whom it suffered throughout the nineteenth century.[37] The constitutionalists understood that the process of selecting ministers determined the independence of the entire judiciary, by the simple truth that a person responsible for appointments to any political position retains power over that position.[38] The constitutionalists therefore placed the selection in the hands of

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31. *See* FELIPE TENA RAMÍREZ, DERECHO CONSTITUCIONAL MEXICANO [Mexican Constitutional Law] 484-85 (1995). Two recent articles describe the 1994 liquidation and replacement of the entire Supreme Court with eleven new ministers, but both articles contain errors of fact. *See* Vargas, *supra* note 9, at 297. Vargas describes President Zedillo's abolition of the sitting court as "an unprecedented decision," despite the fact that Presidents Plutarco Elias Calles and Lázaro Cárdenas had done the same thing in 1928 and in 1934, respectively. *See id.* at 297; TENA RAMÍREZ, *supra*, at 484-85; *see also Recent Judicial Reform*, *supra* note 9, at 1929. This latter Note states that ministers served six-year terms of office, coinciding with a presidential administration, implying that appointing eleven new ministers in 1994 represented a normal substitution, when in fact sitting ministers on the Supreme Court had lifetime tenures from 1944 to 1994. *See Recent Judicial Reform*, *supra* note 9, at 1919; CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 94 (modified 9/21/44); *see also* GUTIÉRREZ & RIVES, *supra* note 21, at 330-31.

For a description of the Mexican judicial branch and the titles of the various Mexican judges and justices, see *supra* note 10.

32. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 94 (modified 8/20/28); GUTIÉRREZ & RIVES, *supra* note 21, at 330; *see also* Cabrera, *supra* note 13, at 205.

33. *See* Cabrera, *supra* note 13, at 205. The Supreme Court was divided into *Salas* (Chambers) before 1857 and after 1900. *See id.*

34. *See id.*

35. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 94.

36. *See* Cabrera, *supra* note 13, at 204-05.

37. *See id.* at 197-98.

38. *See* ARTEAGA NAVA, *supra* note 10, at 482-83.

Removal power is also a source of control over a position. By law, procedures for removal depend upon the level of the judge. Since 1994, magistrates and judges are subject to discipline by the *Consejo de la Judicatura Federal* (Council of the Federal Judiciary). *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 100 (modified 12/31/94); Mario Melgar Adalid, *El Consejo de la Judicatura Federal y la Reforma al Poder Judicial de México* [The Federal Judicial Council and the Reform of Mexico's Judicial

Congress, which would approve each individual minister by a two-thirds majority vote.[39] Nominations for minister would come from each state legislature.[40] By giving the state legislatures the power of nomination, the constitutionalists sought to break the pattern of Supreme Court subordination to the President.[41]

As a second measure to ensure judicial independence, ministers received qualified lifetime appointments.[42] This measure was meant to further strengthen the judicial branch, as the Constitution implied that ministers could only be removed for bad conduct.[43] The vote of confidence in the judiciary, as illustrated by lifetime appointments, was tempered, however, by transitional legislation. Lifetime appointments would only be allowed after an initial two-year probationary "trial" period, followed by an additional four-year "trial" period.[44] After each "trial" period the legislature could review each minister's conduct and determine reappointment.[45]

2. 1928

President Plutarco Elias Calles, who would do more than almost any other Mexican leader in the twentieth century to institutionalize the dominance of the executive branch, weakened the judicial power created by the 1917 reforms. In 1928, all ministers had lifetime appointments, but President Calles, in disregard for the division of governmental powers and the 1917 Constitution, summarily discharged all the Supreme Court ministers.[46]

Following his own precedent, President Calles instituted a series of reforms, which ignored not only the Constitution's division of powers, but much of the original intent of the 1917 constitutionalists. In the most important reform of 1928, President Calles returned nominations for ministers to the pre-1917 formula,

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Power], 13 ARS IURIS 185 (1995). *See also infra* Parts II.B.4.a and III.C.2.

Before 1994, magistrates and judges were subject to discipline. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 94; *see also infra* notes 171-173 and accompanying text. The Constitution also included a clause, modified to be more or less threatening as needed over the years, which allowed for justices to be removed following a trial for misconduct. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 94. Ministers of the Supreme Court have always been subject to a process of removal by Congressional trial, as recognized by the Constitution in the section regarding conduct of public servants. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 108-114.

Between 1928-1934, however, the President enjoyed the special privilege of being able to ask the Mexican Congress to vote for the removal of Supreme Court ministers by a simple majority, without the burden of having to prove misconduct. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 94 (modified 8/2/28 and 12/15/34); REFORMA DEL SISTEMA, *supra* note 10, at 172. This power of removal served to cow the judiciary. In actual practice, however, the President has not used the constitutional method to dismiss ministers of the Supreme Court. The executive has routinely fired all sitting Supreme Court ministers and reappointed new ones. *See infra* Part II.B.2-II.B.4.

39. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 96.

40. *See id.*

41. *See* ARTEAGA NAVA, *supra* note 10, at 484-85.

42. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 94.

43. *See* Cabrera, *supra* note 13, at 203; *see also supra* note 38 and accompanying text.

44. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 94.

45. *See id.*

46. *See* TENA RAMÍREZ, *supra* note 31, at 484-85.

giving the President the power to name the Supreme Court ministers with the approval of the Senate rather than the entire Congress.[47] If the constitutionalists of 1917 had believed in any one principle, it was that the President should not appoint Supreme Court ministers, given Mexico's historical experience of excessive presidential influence over the judicial and legislative branches.[48]

Changes in 1928 also included an expansion of the Supreme Court from eleven to sixteen ministers,[49] disregarding the 1917 constitutionalists' justifications for a small Supreme Court.[50] President Calles' expansion of the Supreme Court seems to have been initiated with the purpose of increasing his power.[51] The reforms further distorted the framers' intent by re-dividing (in pre-1917 fashion) the Supreme Court into three *Salas*, composed of five ministers each (the President of the Supreme Court did not belong to any *Sala*).[52] Each *Sala* was established to hear specialized cases in civil, penal, and administrative law.[53]

3. 1934

The reform of 1934 must be understood in the context of a period of further consolidation of political power in the hands of the President. In 1933, the

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47. *See* GUTIÉRREZ & RIVES, *supra* note 21, at 335.

48. *See* ARTEAGA NAVA, *supra* note 10, at 482-85. Judicial reform in 1928 should be understood in the larger political and historical context of a period of years during which the presidential-authoritarian regime took the shape which it has retained to this day.

In 1929, Calles founded the predecessor party to the *Partido Revolucionario Institucional* (Institutional Revolutionary Party) (PRI), which is today the longest consecutive ruling party in the world. *See generally* BARRY, *supra* note 10, at 6, 9. Since Calles' regime, the PRI has been closely tied with the office of the presidency, a symbiotic relationship which has made the PRI overwhelmingly dominant among parties and the presidency overwhelmingly dominant among the three separate branches of government. *See id.* at 13. A PRI majority in both houses of Congress and a pliant judiciary have combined to give the office of the presidency an inordinate amount of political power from 1928 to the present. The President's unwritten power to hand-pick his successor also has concentrated power in the executive branch, because every would-be President accedes to the current President's wishes or loses access to power. *See id.* at 17. Since 1928, the Congress has never acted as an effective check on the President, nor has the Supreme Court challenged the President on any case of significance. *See id.* at 16, 18.

49. *See* GUTIÉRREZ & RIVES, *supra* note 21, at 330.

50. *See* Cabrera, *supra* note 13, at 204-05. Like President Calles, leaders in other Latin American countries have increased the numbers of Supreme Court justices with the intention of augmenting their influence. The Brazilian military government in the 1960s treated Brazil's highest court "like a suitcase," packing it and unpacking it at will. *See* Rosenn, *supra* note 12, at 27-28. In 1990, Argentina's President Carlos Menem secured legislation which expanded Argentina's Supreme Court from five justices to nine, allowing President Menem to fill the court with candidates of his own choosing. *See* Owen Fiss, *The Right Degree of Independence, in* TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY 55, 62 (Irwin Stotzky ed., 1993).

[EDS. NOTE: In the United States, President Franklin Delano Roosevelt's "court packing" plan of 1936 proposed giving the executive the power to appoint one additional justice for each justice over the age of seventy (six at the time), hoping to gain judicial support for Roosevelt's New Deal programs which were being invalidated by the Supreme Court at the time. *See* MICHAEL LES BENEDICT, THE BLESSING OF LIBERTY: A CONCISE HISTORY OF THE CONSTITUTION OF THE UNITED STATES 296-97 (1996).]

51. Nineteen twenty-eight would not be the last time a Mexican President decided to increase the size of the Supreme Court in the interest of weakening the judicial branch. *See infra* Part II.B.3.

52. *See* GUTIÉRREZ & RIVES, *supra* note 21, at 330.

53. *See* EMILIO O. RABASA & GLORIA CABALLERO, MEXICANO: ÉSTA ES TU CONSTITUCIÓN [Mexico: This Is Your Constitution] 250 (1995).

elimination of the ability of legislators to run for re-election[54] ensured that Congress would remain a docile adjunct of the executive branch.[55] In 1934 it was the Supreme Court's turn for submission.

Perhaps the only twentieth-century Mexican President who rivaled President Calles in sheer aggregated power was his successor, Lázaro Cárdenas.[56] With obvious disregard for an independent judiciary, President Cárdenas began his reform, like President Calles before him, by firing all of the sitting ministers of the Supreme Court, despite their guarantees of lifetime tenure.[57]

Continuing in the direction of the 1928 reforms, and in direct conflict with the intentions of the 1917 constitutionalists, President Cárdenas increased the number of ministers to twenty-one, and added an additional *Sala* for labor cases.[58] The 1917 constitutionalists' arguments for a court which acted as a unified body with a manageable number of ministers were again consigned to the dustbin of history.

Unlike previous reforms, the 1934 reform eliminated the constitutional provision of lifetime tenure for Supreme Court ministers, and replaced it with six-year terms, to run concurrent with the presidential term.[59] The elimination of lifetime tenure for ministers sealed Presidents Calles and Cárdenas' transformation of Mexico's Constitution from a document which guaranteed a strong presidency to one guaranteeing an unequal presidentialist regime.

Although the six-year terms were later re-expanded to lifetime positions in 1944,[60] the low opinion held for the Supreme Court, which the 1928 and 1934 reforms established, remains to this day. A position on the Supreme Court

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54. *See* GUTIÉRREZ & RIVES, *supra* note 21, at 282; CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 59 (modified 4/29/33); *see also* Michael C. Taylor, *Constitutional Crisis: How Reforms to the Legislature Have Doomed Mexico*, 13 MEXICAN STUDIES/ESTUDIOS MEXICANOS (forthcoming Summer 1997).

According to the Constitution of 1917, members of the two houses of Congress could be re-elected after their term expired. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 59, original. Since 1933, and continuing to this day, however, members of Congress are forbidden from seeking re-election. *See id.* art. 59 (modified 4/29/33). Technically, a member may leave office for a term and then seek it again after a "sitting out" period. *See id.*

It is easy to see why the Mexican Congress would be and has been weakened immeasurably by the ban on re-election. No member of Congress gains legislative experience, seniority, or prestige which would empower him or her to check the power of the President. Legislative obsequiousness to the President is an outcome of the ban on re-election. Further, because the legislator does not depend upon the electorate for his or her next political position, he or she has little incentive to serve the voters. Regardless of performance, the legislator is forced out of office. The beneficiary of the ban on legislative re-election in terms of power is the President.

55. *See, e.g.*, REFORMA DEL SISTEMA, *supra* note 10, at 148.

56. There were a few interim Presidents between Calles and Cárdenas. *See id.* at 229.

57. *See* TENA RAMÍREZ, *supra* note 31, at 484-85.

58. *See* RABASA & CABALLERO, *supra* note 53, at 250; CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 94 (modified 12/15/34). Twenty-one was a number too large to allow for thoughtful discussions or consensus on legal issues. *See* GUTIÉRREZ & RIVES, *supra* note 21, at 331.

The Reform of 1951 added five extra "floating" ministers known as "*ministros supernumerarios*" to the existing twenty-one, further diluting the power of the ministers on the Supreme Court. *See id.*; CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 94 (modified 2/19/51).

59. *See* GUTIÉRREZ & RIVES, *supra* note 21, at 330; CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 94 (modified 12/15/34).

60. *See* GUTIÉRREZ & RIVES, *supra* note 21, at 331; CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 94 (modified 9/21/44).

continues to lack the prestige, for example, of a good teaching position at a respected law school in Mexico.[61] The 1928 and 1934 reforms help to explain this phenomenon.

4. 1994

Incoming President Ernesto Zedillo, enjoying the mandate of a reasonably clean election, announced on December 5, 1994 his intention to reform twenty-seven constitutional articles relating to the judicial branch.[62] Twenty-six days later, on December 31, 1994, the reforms became official through publication in the *Diario Oficial de la Federación de los Estados Unidos Mexicanos* (The Official News of the Federation of the United Mexican States).[63] True to the historical precedent of his predecessors in 1928 and 1934, President Zedillo began the reform by dissolving the existing Supreme Court.[64] Zedillo's reform eliminated the "floating" ministers of the Supreme Court, and reduced the numbers of ministers from twenty-one to eleven.[65] Concurrent with shrinking the number of Supreme Court ministers, the 1994 reform also shrank the number of specialized *Salas* from four to two, one for administrative and labor cases, the other for civil and penal cases.[66]

Additionally, the reform of 1994 reduced the ministers' terms of office from lifetime appointments to a fifteen year term, without the possibility of renewal.[67] The ministerial selection process was modified to require the President to submit to the Senate a list of three candidates for each ministerial position from which the Senate had to choose.[68] The reforms raised the vote required in the Senate for approving ministerial appointments from a simple (greater than one-half) majority to a super (two-thirds) majority.[69] If the Senate rejects all three candidates, the President must present a list of three new candidates.[70] If the Senate again rejects the list of new candidates, the President then has the power to select which candidate would fill each open ministerial position.[71]

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61. *See* Interview with Elisur Arteaga Nava, legal scholar, in Mexico City, Mex. (Nov. 15, 1995).

62. *See* Mario Melgar Adalid, *La reforma judicial mexicana, notas sobre el Consejo de la judicatura federal* [The Mexican Judicial Reform, Notes about the Federal Judicial Council], 30 ALEGATOS 160 (1995).

63. *See id. El Diario Oficial de la Federación de los Estados Unidos Mexicanos* is an official government publication, similar to the *United States Federal Register.*

64. *See* Vargas, *supra* note 9, at 297; *see also supra* note 31.

65. *See* Vargas, *supra* note 9, at 296; CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 94 (modified 12/31/94).

66. *See* Ignacio Burgoa Orihuela, *Evaluación crítica de la Reforma Judicial Federal zedillista* [Critical Evaluation of Zedillo's Federal Judicial Reforms], 13 ARS IURIS 43, 43-44 (1995).

67. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 94 (modified 12/31/94).

68. *See id.* art. 96 (modified 12/31/94).

69. *See id.* Although the PRI still dominates the Senate by a three-quarters majority of the seats, the day may come when the Senate is a more pluralistic chamber. *See* Stephen Fidler, *More Time and Money Needed,* FINANCIAL TIMES, Oct. 28, 1996, at Survey 3.

70. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 96.

71. *See id.*

a. Creation of the *Consejo de la Judicatura Federal* (Council of the Federal Judiciary)

The most original reform of 1994 was the creation of an administrative body within the judicial branch to oversee administrative decisions, appointments, and disciplinary action, as well as other policy questions.[72] The inspiration for the *Consejo de la Judicatura Federal* came from Spain and Italy which had similar administrative bodies in their judicial branches.[73] The stated purpose of the *Consejo de la Judicatura Federal* is to increase the administrative autonomy of the judicial branch, and to free the Supreme Court from some of its administrative duties.[74] The *Consejo de la Judicatura Federal* is comprised of seven members: the President of the Supreme Court, three magistrates or judges[75] (chosen by lottery from each of the three lower courts—the Collegiate Circuit Courts, the Unitary Circuit Courts, and the District Courts), and three appointees (one selected by the executive branch, and two selected by the Senate.)[76]

b. Creation of the *Acciones de Inconstitucionalidad* (Unconstitutional Action) Procedure

The *acciones de inconstitucionalidad* procedure, also introduced in the reform of 1994, empowers the Supreme Court to strike down unconstitutional legislation.[77] This procedure allows the Supreme Court to make a decision affecting legislation by declaring it invalid.[78] It represents an unprecedented step forward in Mexican jurisprudence because the Supreme Court never before had been given the power to strike down legislation.[79] Previously, because of the fear of judge-made law,[80] the judicial branch had been limited to ruling on cases without "general effects."[81]

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72. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 100 (modified 12/31/94); *see also* Melgar Adalid, *supra* note 38, at 185.

73. *See* Melgar Adalid, *supra* note 38, at 208-21. Constitutional scholar Héctor Fix-Zamudio is credited with bringing forward the idea of the *Consejo de la Judicatura Federal*. *See* Melgar Adalid, *supra* note 62, at 167 n.18.

74. *See* Melgar Adalid, *supra* note 62, at 165. For a critical look at the actual autonomy of the *Consejo de la Judicatura Federal*, see *infra* Part III.C.2.

75. For an explanation of Mexican courts and judicial titles, see *supra* note 10.

76. *See* Melgar Adalid, *supra* note 62, at 163-64; CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 100 (modified 12/31/94).

77. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 105, frac. II (modified 12/31/94).

78. *See* RABASA & CABALLERO, *supra* note 53, at 281.

79. *See id.*; *see also* José Ramón Cossío D., *Comentario Artículo 105*, *in* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS COMENTADA [The Political Constitution of the Mexican United States Commentated] 1033, 1051 (1995).

80. *See supra* Part II.A.

81. "General effects" is known in Mexico as *erga omnes*. The phrase is commonly used to mean that similar cases will be decided similarly. Courts in the United States influence legislation with general effects through the principle of *stare decisis*, which is somewhat comparable to *erga omnes*.

Despite a traditional reluctance to give the Supreme Court the power to effectively strike down or interpret legislation with general effects, some scholars have recently proposed giving the judiciary this power. *See, e.g.*, JAIME F. CÁRDENAS GRACIA, TRANSICIÓN POLÍTICA Y REFORMA CONSTITUCIONAL EN MÉXICO 167-68 (1994);

While the adoption of *acciones de inconstitucionalidad* was ground breaking, the requirements for its use make it impractical.[82] First, in order to use this procedure, a constitutional challenge must be raised within thirty days of the law's publication.[83] Second, the challenge must be raised by either the Attorney General or by 33% of either house of Congress or by 33% of a state legislature.[84]

Although the constitutional reforms since 1917 show executive attempts to undercut judicial prestige and autonomy and a mistrust of judicial power, changes in the Supreme Court's composition and organizational structure explain only part of the reason why Mexico suffers without the rule of law. A more important limitation on the judiciary is a limitation on the power of judicial review, as illustrated by the *amparo* suit.

C. *Judicial Review in Mexico*

The *amparo*[85] suit serves both as a method of judicial review and as a means of challenging the Constitution. With an *amparo* suit an aggrieved party initiates legal proceedings claiming a violation of a constitutionally protected right.[86] The plaintiff challenges the acts of a government authority or an unfair law within the context of a concrete case.[87] A judgment resolves only the plaintiff's particular case, without setting future precedent or affecting other potential parties.[88]

The main features of an *amparo* suit are as follows: (1) all constitutional arguments within the Mexican judicial system must become *amparo* suits, following special *amparo* procedures; (2) *amparo* suits may be heard only by centralized courts;[89] (3) *amparo* suits may be filed only against government authorities; and (4) all *amparo* suits must be filed by individual citizens with rights claims.[90]

An *amparo* suit can be characterized as one of four different types.[91] The first type of *amparo* suit is a specific complaint about an injustice done by a government body.[92] Examples of this type are claims of police mistreatment or

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REFORMA DEL SISTEMA, *supra* note 10, at 165, 174-77; HÉCTOR FIX-ZAMUDIO, INTRODUCCIÓN AL ESTUDIO DE LA DEFENSA DE LA CONSTITUCIÓN EN EL ORDENAMIENTO MEXICANO [An Introduction to the Study of Constitutional Challenges in the Mexican System] 65-66 (1994).

82. For a discussion of the impracticality of the requirements, see *infra* Part III.C.3.

83. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 105, frac. II.

84. *See id.*

85. The literal translation of *amparo* is protection. *See* DICCIONARIO DE TÉRMINOS LEGALES 11 (Louis A. Robb ed., 1992). An *amparo* suit is defined as a "constitutional guarantee for protection of civil rights." *See id.*

86. *See* Cabrera & Headrick, *supra* note 9, at 253, 274-75.

87. *See id.* at 274-75.

88. *See id.* at 264.

89. In 1917 only the Supreme Court was empowered to hear *amparo* suits. *See* Fix-Zamudio, *supra* note 10, at 163-64. Since 1951 the jurisdiction to hear *amparo* suits has been expanded to include the *tribunales colegiados de circuito* (collegial circuit courts) created specifically for this purpose. *See id.*

90. All four characteristics are standard features used to describe the *amparo* suit. *See, e.g.*, del Río Rodríguez, *supra* note 9, at 14-15. *See generally* Cabrera & Headrick, *supra* note 9.

91. *See* FIX-ZAMUDIO, *supra* note 81, at 61-62. Fix-Zamudio describes a fifth type of *amparo* suit, known as an *amparo social agrario* (agrarian society), a special procedure for farmers. *See id.* at 61-62. This type of suit has become less important since the creation of *tribunales federales agrarios* (federal agrarian courts). *See id.*

92. *See id.* at 61.

illegal property seizure.[93] The constitutional appeal is made with reference to the first twenty-nine articles of the Constitution of 1917, known as the *garantías individuales* (list of human rights).[94]

The second kind of *amparo* suit is an *amparo contra leyes* (against laws) in which the plaintiff argues that a written law violates constitutional principles.[95] The individual challenges a law, not to have it struck from the books, but rather to gain a personal exception from it for particular reasons to be presented.[96] In the case of a favorable decision for the plaintiff, the individual personally gains exemption, but the law stands.[97]

The third kind of *amparo* suit is an *amparo casación* (appeal) which is essentially an appeal of a lower court judge's decision, on the grounds that the decision violated a constitutional provision due to an "inexact" application of the law by the lower court judge.[98] The fourth kind of *amparo* suit challenges the decision or act of a government body when recourse to a special administrative court is unavailable.[99]

The four kinds of *amparo* suits taken together form the vast majority of constitutional challenges in Mexico.[100] The first two types of *amparo* suits will be described in more detail below because they are essential to understanding the institutional roots of weakness in the Mexican judicial branch.

1. *Amparo* Suit Against Government Abuse

The *amparo* suit against governmental abuse is perhaps the "classic" *amparo* suit, revealing much about the evolution of both judicial review and the judicial branch in Mexico. The *amparo* suit was first recognized in the Constitution of 1857, a forward-looking liberal text which armed the courts with a constitutional reference for defending the rights of the wronged through an extensive list of *garantías individuales*.[101] "The federal judiciary developed historically with the main purpose of bringing justice to the people and protecting human rights before that of interpreting the laws or maintaining particular principles of legal techniques."[102] Having developed concurrently with the institution of the *amparo* suit, the Mexican judicial system has reflected the primary goal of the *amparo* suit—the defense of human rights.[103]

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93. *See id.*

94. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 1-29.

95. *See* FIX-ZAMUDIO, *supra* note 81, at 61.

96. *See* Cabrera & Headrick, *supra* note 9, at 264.

97. *See id.*

98. *See* FIX-ZAMUDIO, *supra* note 81, at 61. This is based upon Roman law. *See supra* Part II.A.

99. *See* FIX-ZAMUDIO, *supra* note 81, at 61.

100. There are other methods of constitutional challenges, but the *amparo* suit is the most significant and the other methods are rarely used. *See id.* at 48-49, 54, 56, 58.

101. *See generally* Fix-Zamudio, *supra* note 10, at 124-33.

102. *Id.* at 16.

103. *See* del Río Rodríguez, *supra* note 9, at 15-16.

Judicial review as a method for defending human rights is a very different task from interpreting and shaping the meaning of a constitutional text. In a case alleging a government violation of a citizen's rights, the Supreme Court (or the Collegial Circuit Courts, which also are empowered to hear *amparo* suits) is rarely asked to make a judgment about whether or not the "right" in question is constitutionally protected.[104] Usually, the constitutional right is clear and agreed upon as protected under the first twenty-nine articles of the Constitution.[105] Rather it is whether the right was violated that is at issue. The central questions faced by the Supreme Court relate to establishing the facts of the case, not to the meaning of the constitutional text. Furthermore, the function of a minister or magistrate presiding over an *amparo* suit against government abuse is to apply the law, interpreting the law as *strictly* as possible.[106] Judicial review of constitutional issues in Mexico since the last century, continuing to this day, refers merely to a special procedure for challenging government acts in the name of human rights.[107] Straightjacketed by the emphasis on facts over interpretation, the *amparo* suit against government abuse is consequently a weak tool for defending human rights.

2. *Amparo Contra Leyes*

The *amparo contra leyes* suit is used to challenge a law as unconstitutional and to allow the plaintiff to receive an exemption from the law. However, even if the plaintiff is victorious, the law in question remains in effect until legislatively overturned.[108] The minister or magistrate cannot invalidate the law through judicial decision because that would constitute "judge-made law" and, therefore, would be a violation of the Roman law principle of "separation of powers."[109]

III. WEAKNESSES IN THE MEXICAN JUDICIAL SYSTEM

This section summarizes the main problems of the *amparo* suit, critiques the 1994 constitutional reforms, and outlines other institutional sources of a weak

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104. *See* Cabrera & Headrick, *supra* note 9, at 261.

105. The title of the section of the Mexican Constitution comprised of Articles 1-29 is called "De los Garantías Individuales." CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art 1.

> The legality *amparo*, which protects the constitutional right of legality, has no counterpart in the American system in any sort of proceeding. By means of this right, all violations and mistaken interpretations of federal or state laws are transformed into violations of the Constitution. The person who has suffered an improper application of the law by any government authority can allege that he has been deprived of a constitutional right, and hence bring an *amparo* [suit].

Cabrera & Headrick, *supra* note 9, at 259. The logical implication is that most *amparo* suits will not involve determining whether a "right" is violated, because illegality is itself a violation of a "right," but will involve instead the issue of whether or not the event in question occurred.

106. *See id.* at 263.

107. *See* Cabrera & Headrick, *supra* note 9, at 260.

108. *See id.* at 264; *see also* REFORMA DEL SISTEMA, *supra* note 10, at 174-77.

109. *See* MERRYMAN, *supra* note 15, at 59-71.

judiciary, including jurisprudence, specialty courts, lack of enforcement powers, and low prestige.

A. *The Limitations on the Use of an* Amparo *Suit*

The requirements for an *amparo* suit create legal limitations on the effectiveness of the suit for a variety of reasons. First, the segregation of all constitutional issues into *amparo* suits lowers the "constitutional consciousness"[110] of a significant part of the judiciary.[111] A judge who has never been asked to rule on a constitutional issue is less likely to be able to defend constitutional principles. If a plaintiff wishes to make a constitutional claim, he must file a separate *amparo* suit distinct from his original claim.[112] Because constitutional arguments may not be raised in "non-*amparo*" courts,[113] most magistrates and judges remain excluded from hearing and ruling upon constitutional issues.[114] Therefore, it seems logical that a majority of the judiciary views constitutional defenses as the task of the Supreme Court and the Collegial Circuit Courts. The judicial segregation of the *amparo* suit has unfortunate effects on the constitutional awareness of vast portions of the judiciary. The majority of magistrates and judges are never given the opportunity to develop a facility for defending, defining, and interpreting constitutional principles.

Second, the segregation of the *amparo* suit to specific courts historically has caused an overwhelming number of cases to come before Mexico's highest court.[115] Because the Supreme Court had exclusive jurisdiction of the *amparo* suit before 1951, its docket was consumed with such suits.[116] Even after 1951, and as recently as 1987, the Supreme Court continually struggled to keep up with

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110. *See* MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 79 (1971).

111. Only the Supreme Court and Collegial Circuit Courts may hear *amparo* cases. *See supra* notes 10 and 89 and accompanying text. All other courts are precluded from hearing *amparo* cases and hence constitutional arguments. I refer to these other courts as "non-*amparo*" courts to distinguish them from the Supreme Court and the Collegial Circuit Courts.

112. *See supra* notes 85-90 and accompanying text.

113. *See supra* note 111 and accompanying text.

114. Non-*amparo* magistrates and judges handle over 90% of all court cases. *See* A LA PUERTA DE LA LEY: EL ESTADO DE DERECHO EN MÉXICO [At the Law's Door: The State of Mexican Law] 61 (Héctor Fix Fierro ed., 1994) [hereinafter A LA PUERTA DE LA LEY].

115. *See* Cabrera & Headrick, *supra* note 9, at 265. Despite the fact that the Supreme Court is rarely criticized by legal scholars, the huge backlog of cases which has hampered the Supreme Court since the nineteenth century is widely-acknowledged—even by the judicial branch's biggest defenders. *See, e.g.*, Fix-Zamudio, *supra* note 10, at 150, 164-68.

116. *See* Fix-Zamudio, *supra* note 10, at 160-61. The Supreme Court also has jurisdiction over inter- and intra-governmental conflicts as specified in the Constitution. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 105.

In 1917, the Supreme Court had exclusive jurisdiction over conflicts between states, conflicts between branches of a state government, and conflicts between state(s) and the federal government. *See id.*

In 1994, the Supreme Court's jurisdiction was expanded to include also conflicts between the federal government and a municipality, conflicts between the executive and the legislative branches, conflicts between the federal district and states or municipalities, and conflicts between municipalities and states. *See id.* (modified 12/31/94).

the thousands of cases to which it had exclusive jurisdiction.[117] The newer Collegial Circuit Courts, empowered to receive *amparo* suits after 1951, also find themselves swamped with *amparo* cases.[118]

Third, the Supreme Court historically has lacked control over its workload. Throughout the nineteenth century and half of the twentieth century, the Supreme Court had served as the first stop for all *amparo* suits. Giving the Supreme Court exclusive control over all *amparo* suits, and hence all constitutional cases, demonstrated a lack of confidence in entrusting non-*amparo* courts with important issues. An extensive lower and district court network existed in 1917, but remained excluded from the *amparo* suit, not for convenience, but for reasons of mistrust.[119]

Additionally, by recreating the conditions for an overburdened Supreme Court in 1917, the constitutionalists showed a lack of regard for the power of the highest court. The problem of too many cases existed as far back as the year 1880, when the Supreme Court decided 2,108 cases.[120] Certainly the constitutionalists must have understood that centralizing the jurisdiction over constitutional challenges would result in too heavy a judicial caseload. By denying the Supreme Court the ability to control its workload, the constitutional designers demonstrated that they considered an overburdened court unfortunate, but necessary.

Fourth, although the Supreme Court is no longer buried in cases, a great majority of *amparo* suits are thrown out of the federal courts, probably due to the courts' heavy workload. The *Centro de Investigación para el Desarrollo*[121] (Center of Investigation for Development) (CIDAC) reports that while 11% of plaintiffs were successful in their *amparo* suit in 1992, and 12% were unsuccessful, a full 77% of all *amparo* suits filed resulted in a denial of proceedings.[122]

Improper procedure is the most common reason given by the Supreme Court for a denial.[123] While CIDAC considered the possibility that the courts are weeding out meritorious cases from nonmeritorious ones, it found instead that the Supreme Court and Collegial Circuit Courts have enacted excessively rigid

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117. *See generally* FIX-ZAMUDIO, *supra* note 81, at 62-63.

118. *See* A LA PUERTA DE LA LEY, *supra* note 114, at 79.

119. *See* Fix-Zamudio, *supra* note 10, at 153 (commenting that the authors of the 1917 Constitution decided that between the possibility of corrupt local judges and the danger of centralization, the latter was the lesser of two evils); *see also id.* for a discussion on the mistrust of local judges. Mistrust of local judges may be just as strong today. *See, e.g.*, ARTEAGA NAVA, *supra* note 10, at 492. "Only those who do not know how [the district courts] operate would defend their existence." *Id.* (translation by Michael C. Taylor).

120. *See* Fix-Zamudio, *supra* note 10, at 150.

121. *Centro de Investigación de Desarrollo* (CIDAC) is a non-profit, independent institution dedicated to investigating the economic, social, and political development of Mexico, as well as to strengthening the economy through contributing information in the form of studies, investigations, and development recommendations. *See* A LA PUERTA DE LA LEY, *supra* note 114, at book cover (translation by Michael C. Taylor).

122. *See id.* at 65.

123. *See id.* at 66-67. Improper procedure also appears to be an excuse used by the courts not to proceed with a case. *See id.*

procedural rules in order to reduce their caseload.[124] CIDAC argues that the explanation for the incredible number of denials has more to do with institutional inability to handle the quantity of cases than for any other legal or practical reason.[125]

Fifth, a law declared unconstitutional does not set legal precedent. A successful challenge brought under an *amparo contra leyes* suit, resulting in a ruling that a law is unconstitutional, serves to help solely the individual who brought the suit. For example, a plaintiff may bring an *amparo contra leyes* suit against an over-burdensome tax law as a violation of the constitutional right not to be deprived of a living.[126] A favorable ruling exempts the plaintiff from the tax, which has been, in effect, declared unconstitutional.[127] Nevertheless, all other citizens are subject to the same unconstitutional tax law, unless they too file an *amparo contra leyes* suit (or the legislature decides to change the law).[128]

The consequences of these limitations on the strength of the judicial system are several. First, the political system allows an unconstitutional law to be validly applied to all other citizens. Second, only those citizens attuned to the minutiae of the legal system and who have the economic resources to hire counsel will be able to file an *amparo contra leyes* suit seeking exemption. The rules of the *amparo contra leyes* suit in effect encourage an unfair distribution of justice.[129] A third consequence has been that the Supreme Court and the Collegial Circuit Courts are burdened by requests to exempt different individuals from the same unconstitutional law, preventing the courts from deciding other important issues.[130] Furthermore, because only one affected individual at a time may file an *amparo* suit, an *amparo* suit can not be used for a class-action suit, excluding a useful mechanism for addressing a whole range of emerging issues, such as environmental and consumer rights.[131]

Many civil law countries allow something similar to a United States class-action suit,[132] in which a citizens' coalition can represent a group of people and bring a suit, strengthening their case and saving their resources. It is easy to conceptualize a comparable situation in Mexico in which peasants' rights have been violated by a government action. Although the peasants have neither the resources nor the knowledge to file individual *amparo* suits, only he or she has the right to do so.

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124. *See id.* at 68-80.

125. *See id.* at 79.

126. *See* REFORMA DEL SISTEMA, *supra* note 10, at 175.

127. *See id.*

128. *See id.*

129. *See* ARTEAGA NAVA, *supra* note 10, at 498. "The *amparo* suit has become a true article of luxury that only the highest and most powerful classes can use." *Id.* (translation by Michael C. Taylor).

130. *See* Cabrera & Headrick, *supra* note 9, at 265.

131. *See* MIGUEL ACOSTA ROMERO & GENARO DAVID GÓNGORA PIMENTEL, CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS: LEGISLACIÓN, JURISPRUDENCIA, DOCTRINA [The Political Constitution of the Mexican United States: Legislation, Jurisprudence, Doctrine] 6-8 (3d ed. 1987) (citing the ideas of Lucio Cabrera Acevedo). *See generally* Lucio Cabrera Acevedo, *El Amparo Colectivo* (Jan. 6, 1996) (unpublished essay presented to the Mexican Lawyer's Bar) (on file with author).

132. *See* Cabrera Acevedo, *supra* note 131, at 17-19. *See generally* FIX-ZAMUDIO, *supra* note 81, at 65-66.

Finally, the Supreme Court has ruled that *actos consumados de un modo irreparable* (government acts which have already taken place and cannot be undone) may not be challenged through the use of an *amparo* suit.[133] The justification is essentially "what is done is done," with the belief that a constitutional court case will not right the wrong.[134] Lost in this line of thinking is the idea that punishment after the fact may prevent future government transgressions.[135]

While the above discussion assumes that the *amparo* suit is responsible for Mexico's weak judicial branch, the opposite may also be true. Reversing the direction of causality, we may see that the *amparo* suit is not so much the cause of judicial weakness as it is a symptom—albeit a symptom which in turn discourages seeking a cure. In an environment hostile to judicial power, the *amparo* suit has lasted so long only because it has done so little.[136] Other scholars echo this analysis, arguing that the *amparo* suit developed as a product of the fear that the judicial branch would effectively subject the other powers of government to the law.[137] The *amparo* suit's ineffectiveness has served as an acceptable compromise for constitutional framers hostile to judicial power.

Weak courts and the *amparo* suit have interacted historically to form a vicious cycle of powerlessness. The *amparo* suit, however, is not a unique institution in this regard. Jurisprudence, specialty courts, rules of enforcement, and the lack of prestige associated with judgeships are all symptoms, as well as causes of injustice in Mexico.

B. Jurisprudence

The Supreme Court creates precedent, or *stare decisis*, when it consecutively decides five similar cases in the same way, voting with a super-majority (eight of the eleven) of the ministers.[138] In developing these rules of jurisprudence, nineteenth-century Mexican legislators attempted to emulate the United States system of judicial interpretation, as described by Alexis de Tocqueville.[139] The original creators of the *amparo* suit in Mexico made explicit reference in 1841 to de Tocqueville's description as a justification for the *amparo* suit.[140] A few years later, the framers of Mexico's Constitution of 1857 expressly intended to adopt the United States system of judicial review as described by de Tocqueville.[141] When Mexico's constitutional designers attempted to rigidly follow de

133. *See* A LA PUERTA DE LA LEY, *supra* note 114, at 69.

134. *See id.*

135. *See id.*

136. *See* BAKER, *supra* note 9, at 26.

137. *See, e.g.*, REFORMA DEL SISTEMA, *supra* note 10, at 170.

138. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 94; Héctor Fix-Zamudio & Héctor Fix Fierro, *Comentario Artículo 94*, *in* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS COMENTADA 935, 939-40 (1995).

139. *See* Fix-Zamudio, *supra* note 10, at 124-26.

140. *See id.* at 126.

141. *See id.* at 131.

Tocqueville's description, however, they created a weak institution of jurisprudence which bears little resemblance to the United States model.

Describing United States jurisprudence, de Tocqueville wrote that "when a judge attacks a law in the course of an obscure argument in a particular case . . . the law thus censured is not abolished; its moral force is diminished, but its physical effect is not suspended. It is only gradually, under repeated judicial blows, that it finally succumbs."[142] It is easy to see that the attempt to emulate the United States system of "hidden" jurisprudence, to undermine legislation only gradually "under repeated judicial blows" led to what has been termed the "*regla de cinco*" ("rule of five").[143] Mexican legislators and constitutionalists decided that five consecutive decisions constituted "repeated judicial blows,"[144] although no scholar in Mexico has explained why five consecutive decisions is required to emulate de Tocqueville's formula.

C. Inherent Weaknesses in the Reform of 1994

The judicial reform of 1994 was intended to include the most important changes to the courts since the original Constitutional Congress of 1917. Certainly in terms of the great number of constitutional articles reformed at one time—twenty-seven—the reform was unusual.[145] In the creation of new institutions and the modification of old ones, the 1994 reform represents a milestone. President Zedillo's reforms of the Supreme Court, however, returned to the ideals of the 1917 reform—the last time a significant effort was made to guarantee an independent and effective judiciary. In that sense the 1994 reform is a good, though belated, return to the past. In terms of breaking new ground, however, President Zedillo's reform fell short. Analysis reveals the same historical patterns of mistrust and undercutting of judicial power which have characterized reforms throughout the twentieth century.

1. Replacement of the Supreme Court Ministers

When President Zedillo fired the sitting members of the Supreme Court and replaced them with new ministers, he harkened back to previous times.[146] However, his executive elimination of the leaders of the judicial branch did not pass without criticism, in contrast to previous constitutional reforms.[147]

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142. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 102-103 (1969). A Spanish translation of this passage is cited by Fix-Zamudio as the inspiration for Mexican jurisprudence. *See* Fix-Zamudio, *supra* note 10, at 125 n.25.

143. *See generally* Fix-Zamudio, *supra* note 10, at 124-26. *But see* Lucio Cabrera, *La Jurisprudencia, in* LA SUPREMA CORTE DE JUSTICIA Y EL PENSAMIENTO JURIDICO 242 (Poder Judicial de la Federación ed., 1985) (Mexican jurisprudence is not based upon a mistaken interpretation of de Tocqueville, but rather on a direct understanding of the United States system.).

144. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 94.

145. Past judicial reforms typically affected fewer articles: 1926 (1 article); 1928 (6 articles); 1934 (2 articles); 1937 (2 articles); 1940 (1 article); 1943 (1 article); 1949 (4 articles); 1958 (1 article); 1967 (7 articles); 1979 (1 article); 1982 (1 article); 1988 (5 articles). *See* GUTIÉRREZ & RIVES, *supra* note 21, at 152-54.

146. *See supra* Part II.B.

147. *See* Interview with Juan de Dios Castro Lozano, *Partido Acción Nacional* (National Action Party) (PAN) Senator, in Mexico City, Mex. (Mar. 28, 1996).

President Zedillo was not deterred by the criticism because an opposition party—the right-of-center *Partido Acción Nacional* (National Action Party) (PAN)—supported the change.[148] Political methods previously considered undemocratic suddenly became legitimate because the PAN supported them. A PAN senator explained, for example, that eliminating the entire Supreme Court by presidential decree was legitimate because it was approved by a two-thirds constitutional majority of the Congress.[149]

In the replacement of the twenty-six existing ministers with eleven fresh faces, differences of opinion arose about the legitimacy of the process. By the strict letter of the Constitution, the President should have submitted thirty-three names—three candidates for each of eleven available positions.[150] Most observers agree that the executive submitted a list of eighteen proposed names to the Senate,[151] from which the Senate was to select eleven choices. Names in addition to the original eighteen also may have been mentioned unofficially during the nomination process, but it appears that these nomination additions may have been part of a late attempt to satisfy the constitutional requirement of thirty-three nominations.[152]

Despite the appearance of starting over with a clean slate, the new Supreme Court was born of politics as usual in Mexico. PAN Senator Castro Lozano argues that the process of selection was reasonably legitimate, given that his party agreed with at least eight of the eleven ministers eventually chosen by the ruling *Partido Revolucionario Institucional* (Institutional Revolutionary Party) (PRI).[153] Other scholars claim that the nomination process was fixed by the executive branch.[154] A second nomination list, consisting of the eleven "chosen" ministers, was supposedly sent from the President to the members of his party who control three-quarters of the senatorial seats.[155] Furthermore, the "confirmation

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148. *See id.*

Since 1988, the PRI has lacked the constitutionally-required two-thirds majority in the Chamber of Deputies necessary to reform the Constitution. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS MEXICANOS art. 135; ALONSO LUJAMBIO, FEDERALISMO Y CONGRESO EN EL CAMBIO POLÍTICO DE MÉXICO 172 (1995) (The PRI had a 52%, 64%, and 60% majority of the Chamber of Deputies in 1988, 1991, and 1994, respectively). *See supra* note 48 for a description of the PRI.

Without the necessary two-thirds majority, the PRI has been negotiating constitutional reforms mostly with the PAN, with which it found ideological agreement in favor of issues such as economic liberalization. *See* LUJAMBIO, *supra*, at 171. The PAN supported the 1994 reforms to the judiciary. *See* Interview with Juan de Dios Castro Lozano, *supra* note 147.

149. *See* Interview with Juan de Dios Castro Lozano, *supra* note 147. It is doubtful, however, whether Senator Castro Lozano would have approved removing the President or members of Congress before their terms expired or of replacing them with other politicians, even if this act of removal could be approved by a constitutional congressional majority.

150. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 96 (modified 12/31/94).

151. *See* Interview with Juan de Dios Castro Lozano, *supra* note 147; Interview with Elisor Arteaga Nava, *supra* note 61.

152. *See* Interview with Lucio Cabrera, legal scholar, in Mexico City, Mex. (June 3, 1996).

153. *See* Interview with Juan de Dios Castro Lozano, *supra* note 147. See *supra* note 48 for a description of the PRI.

154. *See* Interview with Elisur Arteaga Nava, *supra* note 61.

155. *See id.*

hearings" conducted by the Senate left much to be desired.[156] The Senate's questioning of candidates most likely had no effect on the eventual selection of ministers because the Senate panel reportedly asked only one question of each candidate.[157]

Despite objections to the process of selection, it should be acknowledged that the 1994 reform produced a Supreme Court whose size is more manageable. The reduction in the number of members of the Supreme Court, although accomplished by abolishing the existing court, represents a positive, practical step forward given that twenty-one, and, at times, twenty-six, ministers could not have been conducive to decision-making.

The reform eliminating lifetime appointments and limiting Supreme Court ministers to terms of fifteen years[158] does not obviously improve the functioning of the entire body; if anything, it reduces the number of years an experienced jurist could serve on the Supreme Court. But, the fifteen-year term does not necessarily restrict a minister's effectiveness. Fifteen years represents a reasonable amount of time for a minister to both feel secure in his or her position and gather enough experience to positively affect the Supreme Court. Most importantly, fifteen years is enough time for ministers to outlast two presidential terms, greatly increasing the likelihood of judicial independence from the executive branch. Additionally, the two-thirds majority requirement for Senate approval of the appointment of a minister is a small, but positive, step towards guaranteeing that ministerial appointments satisfy more than one party.

2. The Attempt at Autonomy by Creation of the *Consejo de La Judicatura Federal* (Council of the Federal Judiciary): One Step Forward, Two Steps Back

The creation of the *Consejo de La Judicatura Federal* (*Consejo*)[159] is another positive step towards increasing the autonomy of the judiciary. The *Consejo* has the potential to improve the functioning of the entire judicial branch. It should relieve the Supreme Court of administrative duties, such as appointing and disciplining magistrates and judges, allowing the Supreme Court to concentrate on its central and recently refined task of defending the Constitution.

But, the membership of the *Consejo* raises old questions of mistrust and lack of respect for the judiciary. Having three justices selected from the lower courts (one from each of the three lower courts), for example, is an admirable idea which allows input into judicial administration from all levels. The selection is made by lottery, however, which shows a lack of confidence that the judiciary will select competent members over political allies.

The most useful way of picking lower court judges would be through a merit system which would ensure that only interested and able members constitute the

156. *See id.*

157. *See id.* Constitutional scholar Elisur Arteaga Nava was present at the confirmation hearings and appears to have submitted most of the questions.

158. *See supra* Part II.B.4.a.

159. *See supra* Part II.B.4.a.

Consejo. Under the current system, a lottery randomly selects members, of varying ability and interest, for an administrative body with great potential power over the federal judicial system. The *Consejo* runs a great risk of selecting mediocre candidates from the judicial branch while simultaneously eliminating the opportunity to select the best. In the interest of making the judicial choices "apolitical," the reforms have hamstrung the *Consejo*. PAN leaders, who approved the reforms of 1994, are currently examining ways to change the lottery method of selecting lower justices for the *Consejo*, but they continue to worry about preventing executive branch attempts to "stack" the *Consejo* with political allies.[160]

The three appointees from the legislative and executive branches provide further evidence that the judicial branch is the weakest of the three governmental powers. Apologists for intervention by the legislature and the executive point to European models which feature appointees or members of other branches.[161] They also cite "checks and balances" and "separation of powers" theories as justifications for the participation of the executive and legislature.[162]

Foreign models, however, are not always applicable to Mexico. The history of executive dominance over both the judiciary and the legislature in Mexico should be sufficient argument against creating more avenues for presidential intervention. Given that the *Consejo* affects only policy within the judicial branch, the "checks and balances" provided by the Senate and the President within the *Consejo* create additional undue interference by the other two branches of government. Further, given the present reality of the Senate majority's obsequiousness to the President,[163] the President has three "sure votes" on the *Consejo*.

The only apparent saving grace of the *Consejo* is that the members of the judicial branch outnumber the other two branches' representatives by four to three. However, even this is not an effective majority. A justifying argument for the three representatives of the Senate and the President has been that once the representatives become members of the *Consejo*, they work for the judicial branch.[164] Scholar Mario Melgar Adalid argues that "breaking the juridical link" between the Senate representatives and the Senate, and between the presidential representative and the President, is sufficient for independence.[165]

Melgar Adalid's argument fails to be convincing for two reasons. First, the origin of any political position determines in great measure the policies and loyalties of the position's holder, notwithstanding attractive phrases such as "breaking the juridical link."[166] Second, the legislation's fine print demonstrates the relevance of the origin of the *Consejo* members. The regulatory legislation

160. *See* Interview with Juan de Dios Castro Lozano, *supra* note 147.

161. *See* Melgar Adalid, *supra* note 38, at 162.

162. *See, e.g.*, Mario Melgar Adalid, *Comentario Artículo 100, in* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS COMENTADA 981, 986 (1995). Melgar Adalid is a current member of the *Consejo*.

163. *See supra* notes 48, 54, 55 and accompanying text.

164. *See* Melgar Adalid, *supra* note 62, at 162-63.

165. *See id.* at 162.

166. *See supra* note 38 and accompanying text.

states that if the *Consejo* acts in a committee, then each committee is to be made up of three members, and further that of these three, two must come from the legislative or executive branch and one must come from the judicial branch.[167] By providing a majority of legislative or executive members on each committee, the legislative and executive branches are guaranteed a majority vote in all work done by the *Consejo*. This reform makes the discourse on "increasing the autonomy of the judicial branch" through the *Consejo* ring hollow.[168]

It should be acknowledged, however, that the *Consejo* may redress a failing of the judicial branch that occurred before 1994. The *Consejo* is responsible for disciplining judges who act inappropriately or who make "irresponsible" rulings.[169] To understand the importance of these changes, an explanation of the previous system of oversight in which the entire Supreme Court theoretically maintained discipline over all lower court judges is necessary.[170]

In practice, each of the twenty-six ministers who formed part of the Supreme Court prior to 1994 was said to have a "stable" of lower circuit court and district court judges for whom he or she was responsible.[171] "Responsibility" in this sense involved a patron-client relationship, in which the minister would do his or her best to ensure a profitable and promising career in return for loyalty.[172] If a lower court judge failed to display sufficient loyalty, or worse, committed either legal or political transgressions in the eyes of the minister, the judge's career would stagnate or otherwise be jeopardized. In the pre-1994 system, political and legal discipline was maintained through the vertical links of a minister's "stable."[173] With the reform of 1994, however, the *Consejo*'s jurisdiction over discipline suggests a more neutral, standardized procedure for overseeing judges.

3. The Unreasonableness of the Standards Imposed in the Newly-Created *Acciones de Inconstitucionalidad* (Unconstitutional Actions) Procedure

The requirements placed upon *acciones de inconstitucionalidad*[174] make a challenge under this new procedure nearly impossible to raise. The flaws in these requirements are obvious. To begin with, raising a challenge to a statute within thirty days is illogical. Either a statute should be struck down for unconstitutionality or it should not, regardless of time. Surviving thirty days

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167. *See* Melgar Adalid, *supra* note 62, at 163.

168. *See supra* note 74 and accompanying text.

169. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 100 (modified 12/31/94); *see also* Melgar Adalid, *supra* note 38, at 200.

170. *See* Interview with Juan de Dios Castro Lozano, *supra* note 147.

171. *See id.*

172. *See id.*

173. *See id.* Understanding the "stable" system also sheds light on why the PAN was eager to join President Zedillo in eliminating the twenty-six sitting ministers. The herculean task of "cleaning the stables" must have seemed impossible to the PAN without firing every minister. The eleven new ministers presumably do not have such well-developed patronage relationships with the lower justices as did their predecessors. For a discussion of patronage and "patron-client" relationships, see BARRY, *supra* note 10, at 21.

174. *See supra* Part II.B.4.b.

unchallenged should not make a law constitutional.[175] Practically speaking, it may take years or decades before a statute's constitutional flaws become clear. Furthermore, the Supreme Court is unlikely to gather evidence within thirty days on the practical ramifications of the challenged legislation, possibly resulting in a decision based upon short-term political calculations. The thirty-day statute of limitations demonstrates the lack of trust and rigidity of thought which has characterized previous judicial reforms.

Additionally, requiring the Attorney General or 33% of a legislative chamber to raise a challenge under *acciones de inconstitucionalidad*[176] makes little practical sense. The Attorney General, a presidential appointee who can be removed by the President at will,[177] is unlikely to raise a constitutional challenge to legislation, because legislation is simply not approved without presidential support.[178] Congress is more likely to raise a constitutional challenge. Again, however, the limitation lacks constitutional sense. Either a legislative act is constitutional or it is not. Raising the issue of constitutionality should not depend upon the legislative support a challenge generates.[179] Was the law in question not the error of the Congress or the state legislature in the first place? Furthermore, given the paucity of federal legislators who are not in the ruling party, obtaining a 33% vote in opposition to a majority-supported law would be difficult.[180]

With the current realities of Mexican politics, the restriction on who may initiate the challenge and the thirty-day time limit virtually guarantees that the *acciones de inconstitucionalidad* procedure will only be used in a political struggle between government branches. The procedure is not likely to be used, as was originally intended, to elicit a carefully reasoned judicial decision about the constitutionality of a controversial statute.

In reviewing the 1994 changes in general, and the *acciones de inconstitucionalidad* in particular, what is striking is not what the reforms did, but rather what they did not do. The 1994 reform is not a great leap forward in the organization of the Supreme Court, but rather a cautious return to an approximation of the Supreme Court's structure in 1917. The creation of weak new procedures, such as the *acciones de inconstitucionalidad*, only emphasizes the need for more profound thinking about judicial review on the part of Mexico's reformers.

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175. *See* Burgoa Orihuela, *supra* note 66, at 51.

176. *See supra* Part II.B.4.b.

177. The presidential power to name the Attorney General is contained in CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 89, frac. IX (modified 12/31/94). *See* ARTEAGA NAVA, *supra* note 10, at 409.

178. *See* Burgoa Orihuela, *supra* note 66, at 51.

179. *See id.*

180. *See id.*; *see also* Héctor Fix-Fierro, *La Reforma Judicial de 1994 y las Acciones de Inconstitucionalidad* [The 1994 Judicial Reform and Unconstitutional Actions], 13 ARS IURIS 109, 118-19. For a discussion of political parties, see *supra* notes 48 and 148 and accompanying text.

D. Other Sources of Weakness

1. Specialty Courts

An additional source of weakness in the judicial branch is the tradition of specialized courts. The executive branch has created entire court systems to deal with specialized legal cases, such as the *Tribunal Fiscal de la Federación* (Federal Fiscal Court), the *Tribunal de lo Contencioso Administrativo del Distrito Federal* (Court of the Federal District for Administrative Conflicts) and the *Tribunal de lo Contencioso Electoral* (Federal Electoral Conflicts Court).[181] Critical analysts see these specialty courts as a political and demagogic attempt at control by the executive branch.[182] Specialty courts outside of the judicial branch have roots going back to colonial Mexico, when nearly every profession had its own tribunals.[183] In terms of power, the executive branch, under whom most of the courts are administered, has benefitted from these proliferating institutions. By creating a court system parallel to the judicial branch, the executive may transfer legal jurisdiction to a set of judges and courts which are primarily under the executive's control.[184]

2. Lack of Enforcement Powers

One result of a strict "separation of powers" doctrine is that the executive branch is charged with enforcing all judicial decisions.[185] All jails, all sentencing, all policing, and all methods of enforcing justice are under the executive branch which should in theory "execute" the wishes of the courts.[186] In practice, however, many *amparo* suits and ordinary court resolutions go unenforced.[187] Not coincidentally, impunity is most evident in those cases which inconvenience the executive branch.[188] Because most *amparo* suits are challenges to government illegality, the *amparo* suit is rendered useless when the executive selectively enforces decisions. The Supreme Court does not have the power to enforce its own decisions even when it finds the government has violated the Constitution.

3. Low Prestige of Judgeships

It should be obvious, but bears re-emphasis, that the power of a judge in Mexico is very different from that of a judge in the United States. This is for two

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181. *See* REFORMA DEL SISTEMA, *supra* note 10, at 170.

182. *See* ARTEAGA NAVA, *supra* note 10, at 494. Specialty courts outside of the judicial branch are common throughout Latin America to this day, and seem to diminish the power of the judiciary in most every country where they appear. *See* Rosenn, *supra* note 12, at 24-27.

183. *See* ARTEAGA NAVA, *supra* note 10, at 493-94.

184. *See* Rosenn, *supra* note 12, at 26.

185. *See* REFORMA DEL SISTEMA, *supra* note 10, at 179-80.

186. *See id.* at 179.

187. *See id.* at 180.

188. *See id.* at 179-80. "The executive impedes and blocks the political implication of the judicial branch when it is convenient to do so by selectively applying penal action, making impunity the rule, not the exception, especially in crimes with political implications." *Id.* (translation by Michael C. Taylor).

reasons: the power of interpretation[189] and prestige. In terms of prestige, judges in Mexico simply do not enjoy the same cultural respect or undergo the same extensive professional preparation as judges do in common law countries. In Mexico, a position as a judge may be obtained by a professional with a legal degree shortly after completing school.[190] Mediocre students and those from lower classes with socioeconomic ambitions tend to fill the ranks of judges.[191] Presumably, the security of a government position offers these lawyers a baseline of socioeconomic status below which they cannot fall.

Additionally, Supreme Court ministers are traditionally politicians who for one reason or another must be removed from the political fray.[192] The implication of this practice of appointment is that while many ministers of the Supreme Court are qualified only by their obsequiousness to the President, a good number can be downright corrupt.

IV. FINAL THOUGHTS

Despite, and because of, decades of constitutional reform, institutional arrangements continue to prevent the Supreme Court and the judicial branch from exercising effective power. The primary obstacle is the *amparo* suit, which limits constitutional cases to a special procedure apart from ordinary legal proceedings. Because of its special nature, its complicated procedures, and its lack of *stare decisis* effect, the *amparo* suit is a severely limiting institution. Until the *amparo* suit is truly reformed, constitutional guarantees remain threatened in Mexico.

Beyond judicial review, however, the Supreme Court must reckon with an institutional history of co-optation and control by the executive branch. While the reform of 1994 has given the Supreme Court some additional powers and control, many steps are still needed before the Supreme Court gains the legitimacy which it has never had and so desperately needs.

Mexico needs court-enforced control of the Constitution. Since the end of World War II, and as a reaction against the experience of fascist Europe in the 1930s, a consensus has developed in comparative law that courts must be able to effectively enforce basic constitutional principles.[193] Mexico, as a nation aspiring to democratic governance, needs a judicial check on its other two branches of power. Democracy, as we in the United States understand it, is impossible in Mexico if the judiciary is too weak to enforce the rule of law.[194]

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189. *See supra* Part II.A.

190. Law students with whom I spoke at the *Universidad Iberoamericana*, an elite, private university in Mexico City, assured me that obtaining a judgeship shortly after leaving the University was both relatively easy and utterly without prestige.

In Mexico, lawyers-to-be enter a five-year legal education program upon completing high school. Thus, new judges may be as young as their early-20s and may never have practiced law.

191. *See* MERRYMAN, *supra* note 15, at 109; *see also* Rosenn, *supra* note 12, at 33.

192. *See* REFORMA DEL SISTEMA, *supra* note 10, at 173. "It has been a frequent practice that the President gives the position of minister to the most malleable elements of the judicial branch, and especially to those public functionaries who see in the judiciary the safe refuge of quite questionable political careers." *Id.* (translation by Michael C. Taylor).

193. *See* CAPPELLETTI, *supra* note 110, at vii-ix.

194. *See generally* TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY (Irwin

To study the judiciary in Mexico, therefore, is to delve into an essential piece of the democracy puzzle. Hopes for a democratic Mexico remain quixotic as long as the country fails to find a method of enforcing the rule of law.

What should be done about improving Mexico's judicial branch and therefore chances for rule of law and democratic governance? There is no quick-fix answer. The answer is not to reform the Constitution, reword the *amparo* suit, and hope for a legal transformation by fiat. The solutions will certainly be hard-won and gradual. Far from suggesting answers, this Article is offered as a diagnosis of institutional ills and as a first step towards necessary change.

V. CONCLUSION

Mexico suffers without the rule of law, a condition which affects every citizen every day, from the President to the poorest peasant. While many explanations may be offered for the national lack of rule of law, this Article has focused on the institutional and legal causes of a weak judicial branch. A review of constitutional reforms reveals a pattern of mistrust of the courts throughout the twentieth century. An analysis of the *amparo* suit and jurisprudence shows how these institutions have been both the cause and effect of a weak judicial branch. Finally, specialty courts, the lack of powers of enforcement, and the low prestige of judgeships combine to strengthen the executive branch at the expense of the judiciary. While these institutions continue unchanged, Mexico may expect neither rule of law nor democracy.

Stotzky ed. 1993) (a collection of essays on judicial function and independence in Latin America).